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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1090

ALFONSO DIUGUID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 32–33) has not yet been reported.

JURISDICTION

The opinion of the circuit court of appeals was rendered on January 23, 1945 (R. 32), and a petition for rehearing, filed on February 2, 1945 (R. 33–36), was denied on February 26, 1945 (R. 37–38). The judgment and order of the court for the issuance of the mandate was entered on February 27, 1945 (R. 38). The petition for a writ of certiorari was filed on March 29, 1945. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 27, 1934.

QUESTION PRESENTED

Whether the trial court erred in admitting evidence procured without a warrant by local police officers and turned over to federal agents.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York in four counts charging him with illegal possession of an unregistered still (26 U. S. C. 2810), with unlawfully making and fermenting mash fit for distillation and the production of spirits and alcohol (26 U. S. C. 2834), with doing business as a distiller without having filed the required bond (26 U. S. C. 2814), and with possessing distilled spirits in unstamped containers (26 U. S. C. 2803) (R. 5–7). His pre-trial motion to suppress certain evidence (see *infra*, pp. 3–5) was denied with leave to renew the motion at the trial (R. 2). He waived a jury trial (R. 8–9), and he was found guilty by the court on each of the four counts (R. 3, 21). He was sentenced to imprisonment for 18 months on each count, the sentences to run concurrently, and in addition he was sentenced to pay fines of $100 on the first count and $500 on each of the second and third counts (R. 3, 23).

The only question involved on the appeal (see R. 24–25, 32–33) and here concerns the propriety of the trial court's action in refusing to exclude at the trial the evidence used against petitioner on the ground that it was secured as the result of an illegal search and seizure by local police officers acting in concert with federal officers (R. 19–21). The proof as to the circumstances under which this evidence was obtained may be summarized as follows:

Edward Kaye, a New York City police officer (R. 10), testified that while he was on duty on the night of April 28, 1943, he received information from a private citizen and a fellow officer that a distillery was in operation at 2016 Dean Street, Brooklyn, and that shortly thereafter, accompanied by another city policeman, he went to these premises, which consisted of a three-story residence building, in which petitioner occupied an apartment on the top floor (R. 9, 10–11, 12–13). The officers did not have a search warrant. Standing outside the door of petitioner's apartment, Kaye detected the odor of fermenting mash.[1] He thereupon knocked on the door and as he did so he heard a sound "like running water." When he received no answer he forced the door and entered the apartment, where he found petitioner, a still, mash, and a quantity of distilled spirits which

[1] Kaye testified that he had participated in the seizure of a number of stills and that he could readily recognize the odor of fermenting mash (R. 11).

did not bear tax stamps. (R. 9, 11.) He arrested petitioner and seized the still and liquor (R. 10, 11; see also R. 18).[2] Kaye then went outside to a store and telephoned agent Sparago of the Federal Alcohol Tax Unit at the latter's home, advising him of the seizure of the still (R. 11–12, 13, 17–18, 19). Sparago happened to be ill at the time, and he arranged for agents Golden and Adler to go to petitioner's apartment (R. 17–18, 19), where, without a warrant, they arrested petitioner and took over the illicit still, mash, and liquor (R. 10, 14, 15, 17, 18, 19).

Kaye testified that he had no prior arrangement with the federal agents to go to petitioner's apartment (R. 11, 12). On cross-examination, he stated that he had "been on cases" with Sparago on former occasions (R. 13), that he had been on "raids" with him "two or three" times, but he denied that he had ever before telephoned Sparago after he had "raided a still," or at any other time (R. 14). Adler testified that he knew

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[2] Petitioner is mistaken in asserting (Pet. 2, 3, 8–9) that the city officers did not arrest him or seize the still and other materials found in his apartment. The record fairly indicates at the pages cited in the text that they did both. Petitioner's reliance on Kaye's negative answer to defense counsel's question on cross-examination, "And you did not arrest the defendant and bring him down to the police station and then call the Federal men, did you?" is, we think, misplaced. The question and answer import only that Kaye did not take petitioner to the police station before calling the federal agents.

nothing of the seizure until he received a call from Golden the night of April 28 advising him that the city police had seized the still and requesting him to accompany Golden to the premises (R. 17–18). Adler also testified that so far as he knew the Alcohol Tax Unit had had no complaint in respect of the operation of a still at petitioner's address and that the agents were not acting in concert with the city police in making the seizure (R. 18).

Upon this evidence, the trial court found "that the officials of the Alcohol Tax Unit and the police were not acting in concert, and that the Federal officers knew nothing about it until after the raid had been consummated" (R. 21). This finding was sustained by the Circuit Court of Appeals for the Second Circuit and the judgment of conviction was accordingly affirmed (R. 32–33, 38).

ARGUMENT

Petitioner contends that the instrumentalities of the crimes charged against him which were taken from his apartment without a warrant were obtained as the result of an unlawful search and seizure and should have been suppressed as evidence. He argues that the city police were acting in concert with the federal agents when the former entered his apartment and found the still and other materials (Pet. 11–12).

We pretermit the question whether, if there had been concerted action, the information which

had come to the city police officers' attention prior to their entry into petitioner's apartment was sufficient to justify a belief that a federal felony was there being committed and thus to permit an entry without a warrant for the purpose of making an arrest and, as an incident thereto, to search the premises for things connected with the crime.[3] For, as we shall show, it is clear from the evidence that there was no collaboration between Kaye and the federal agents; and, as the court below pointed out (R. 33), it is settled that in the absence of any federal cooperation, the admissibility in a federal criminal trial of evidence secured by others than federal officers is not affected by the legality or illegality of the method by which it is procured. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; *Weeks* v. *United States*, 232 U. S. 383, 398; *Edgmon* v. *United States*, 87 F. 2d 13, 15 (C. C. A. 10); *In re Milburne*, 77 F. 2d 310, 311 (C. C. A. 2); *Miller* v. *United States*, 50 F. 2d 505, 507–508 (C. C. A. 3), certiorari denied, 284 U. S. 651; *Vollmer* v. *United States*, 2 F. 2d 551, 552 (C. C. A. 5).

Petitioner seeks to avoid the application of this rule by arguing, contrary to the findings of both

[3] Compare, however, *Agnello* v. *United States*, 269 U. S. 20, 30, 32, 33; *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3); *Rocchia* v. *United States*, 78 F. 2d 966, 969 (C. C. A. 9); *Wida* v. *United States*, 52 F. 2d 424, 425 (C. C. A. 8); *McBride* v. *United States*, 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614.

Feldman v. United States, 322 U.S. 487, 492;

courts below (R. 21, 33), that the federal agents were in fact acting in concert with the local police in the search and seizure. His argument in this regard proceeds in part upon the erroneous hypothesis that the federal agents, rather than the local police, made the initial arrest and seizure (see Pet. 2, 3, 7, 8–9). But, as we have pointed out in the Statement (*supra,* p. 4), the evidence shows that upon their discovery of the still the police officers arrested petitioner and seized the still and other materials, and that the federal agents "took over" (see R. 14, 18) this evidence and arrested petitioner (R. 18) upon their subsequent arrival pursuant to officer Kaye's telephone call to agent Sparago. In addition, Kaye's testimony shows without contradiction that the initial arrest and seizure were made entirely upon his own initiative as the result of information secured from others and his own observation, and that no prearrangement existed with the federal agents whereby he would secure the evidence for them. Kaye's testimony in this regard was corroborated by agent Adler, who stated that he had no prior knowledge of the existence of the still or the raid. (See pp. 3–5, *supra.*) Kaye's testimony on cross-examination that he was acquainted with Sparago and had participated with him in other "raids," upon which petitioner relies as showing cooperation between Kaye and the agents, is of no significance in view of the direct proof

that there was no collaboration in the instant case.[4] By the same token it is immaterial that the federal agents took over the evidence at the premises where it was found, rather than at a place to which the police might have transferred it before notifying the agents of the federal crimes which they had discovered.[5]

There is no merit in petitioner's further contention that the decision below is in "apparent conflict" with the decisions of this Court and of other circuit courts of appeals upon which he relies (Pet. 13–14). Thus, *Miller* v. *United States*, 50 F. 2d 505 (C. C. A. 3), held that evidence obtained under circumstances analogous to

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[4] The trial court refused to permit further inquiry on cross-examination of Kaye as to whether these earlier seizures were made without warrants (R. 14, 15), and petitioner complains that this was error (Pet. 11). While proof that such was the fact may perhaps have been relevant as tending to show cooperation between Kaye and Sparago, the court's ruling did not prejudice petitioner, since the proof that there was no concert of action in this case was uncontradicted.

Petitioner also adverts to the fact that Kaye telephoned Sparago immediately after the initial seizure and he infers that Kaye had Sparago's home telephone number (Pet. 11). The record shows, however, that Kaye left petitioner's apartment and called Sparago from a nearby store (R. 13). For all that appears he may have looked up Sparago's home telephone number in the directory.

[5] There is clearly no basis for petitioner's argument that the federal agents entered his apartment illegally (Pet. 7–10). They had been definitely advised by the city police that the latter had seized an illicit still at petitioner's apartment and that they had petitioner in custody there.

those presented here was admissible. The *Gambino* (275 U. S. 310) and *Sutherland* (92 F. 2d 305 (C. C. A. 4)) decisions likewise turned upon the particular facts presented, the proof in those cases having disclosed that the local officers either acted on behalf of or pursuant to an understanding with the federal authorities in making the seizures held to be illegal,[6] while in *Byars* v. *United States,* 273 U. S. 28, a federal agent participated directly with a state officer in a search made under color of a state search warrant which was held to be invalid under federal law. In *Gilbert* v. *United States,* 144 F. 2d 568 (C. C. A. 10), the illegal search was made by one who the court held was a federal officer, and, moreover, the proof showed an understanding between that officer and other federal officers whereby the Government would take over the prosecution of crimes discovered by him. The *Agnello* (269 U. S. 20) and *Gouled* (255 U. S. 298) cases are wholly inapposite, for the illegal searches and seizures involved there were made by federal officers themselves.

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[6] There is no such situation in the instant case. Not only did the evidence disclose that there was no concerted action between the federal agents and city police, but under New York law, contrary to petitioner's implication (Pet. 12), the unlicensed manufacture for sale of any alcoholic beverage is a misdemeanor, punishable by fine or imprisonment for one year, or both. McKinney's Consolidated Laws of New York Book 3, Alcoholic Beverage Control Law §§ 60, 61, 100, 130, as amended.

CONCLUSION

The settled legal principles governing the admissibility of the challenged evidence were correctly applied by the courts below, and the case presents no real conflict of decisions or question of general importance requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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